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CASE NO. 80-2218

IN THE
SUPREME COURT OF THE UNITED STATES
1980-81 TERM

WILLIAM R. COLE,

PETITIONER-PLAINTIFF

VS.

HENRY B. GRAY, III, FRANCIS J. CUMMINGS, FRED R. JONES and ALVIN HOLMES, EACH INDIVIDUALLY AND EACH IN HIS OFFICIAL CAPACITY,

RESPONDENTS-DEFENDANTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT ALVIN HOLMES IN OPPOSITION

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ATTORNEYS OF RECORD

QUESTIONS PRESENTED FOR REVIEW

1. Is there an issue of fact for trial on a conspiracy complaint where the evidence conclusively shows that the facts relied upon to support allegations of conspiracy are not susceptable of an interpretation that might give rise to an inference of conspiracy?
2. Is a state legislator's conduct protected under the doctrine of legislative immunity where he is acting within the sphere of legitimate legislative activity?
3. Do alleged defamatory remarks constitute a deprivation of rights under the Fourteenth Amendment.
4. Should summary judgment be entered in favor of the moving party where the record is fully developed and there is no genuine issue of material fact and he is entitled to judgment as a matter of law.

LIST OF PARTIES TO THE PROCEEDINGS

The parties to this proceeding in the United States Court of Appeals for the Fifth Circuit were as follows:

William R. Cole, plaintiff-appellee-cross-appellant; Fred R. Jones, defendant-appellant-cross-appellee; Alvin Holmes; defendant-appellant-cross-appellee; Henry B. Gray, III, defendant-appellee and Francis J. Cummings, defendant-appellee.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES TO PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

REPORT OF OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 1

ARGUMENT:

1. Where the evidence conclusively shows that the facts relied upon to support allegations of conspiracy are not susceptable of an interpretation that might give rise to an inference of conspiracy there is no issue of fact for trial on the conspiracy complaint 21

2. Where a state legislator is acting within the sphere of legitimate legislative activity his conduct is protected under the doctrine of legislative immunity 25

3. Alleged defamatory remarks do not constitute a deprivation of rights secured under the Fourteenth Amendment 29

PAGES

4. Where the record is fully developed and there is no genuine issue of material fact and one is entitled to judgment as a matter of law, summary judgment should be entered in favor of the moving party 32

CONCLUSION 36

CERTIFICATE OF SERVICE 37

TABLE OF AUTHORITIES

CASES CITED	PAGES
Adickes v. Kress and Company 398 U.S. 144 (1970)	21
Baker v. McCollan 443 U.S. 137 (1979)	30, 31
Butzv. Economou 438 U.S. 478	34
Gravel v. United States 408 U.S. 606 (1972)	26
Griffin v. Breckenridge 403 U.S. 88 (1971)	24
Ingram v. United States 360 U.S. 672 (1959)	25
Paul v. Davis 424 U.S. 693 (1976)	29, 31
Scheur v. Rhodes 416 U.S. 23d (1974)	32, 34
Tenny v. Brandhove 341 U.S. 367 (1951)	27

REPORT OF OPINION BELOW

Respondent Alvin Holmes accepts petitioner's statement of Reference to Report Of Opinions as being correct.

JURISDICTION

Respondent Alvin Holmes accepts petitioner's statement of Jurisdictional Grounds as being correct.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Respondent Alvin Holmes accepts petitioner's citation of these provisions as being correct.

STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. Sections 1983 and 1985 wherein plaintiff William R. Cole alleged that

defendant Alvin Holmes conspired and acted individually in an attempt to deprive him of his State merit system position in the State Military Department by making defamatory statements which stigmatized his good name and reputation and which resulted in an attempt to have his employment terminated. Cole sought compensatory damages in the amount of $4,000,000.00, punitive damages in the amount of $4,000,000.00 and injunctive relief. (R. pp. 104-122)

Other defendants named in the suit were Adjutant General Henry B. Gray, State Senator Fred R. Jones and Major Francis J. Cummings, Inspector General Investigating Officer in the United States Army. (R. pp. 2-3)

Holmes was at all times relevant hereto a member of the Alabama House of Representatives. In October of 1975 the Alabama Legislature passed a resolution creating a Joint Interim Committee (hereinafter referred to as Committee) to investigate the use of federal monies received by State agencies. Holmes along with two other Representatives and three Senators, including Defendant Jones, was appointed to serve on the Committee. (R.p. 145)

The Committee sought and received information concerning the use of federal money from the State departments and agencies, including the Military Department. While the Committee was conducting its investigation it became aware of certain irregularities in the Military Department which involved among other matters extra duty pay for recruiting and retention activities of officers. (R. pp. 145, 146) Some of the other charges of irregularities in the

Alabama National Guard included alleged misuse of National Guard helicopters for the private benefit of friends of then Adjutant General Rollo, alleged misuse of National Guard canteen funds and State cars by National Guard officers, conflicts of interest in National Guard purchases, and excessive and improper expenditures of National Guard funds for dinners for high ranking National Guard officers. (R. 604) Cole held the merit system position of Military Executive officer in the Military Department and was primarily in charge of personnel and administration. He was also a Colonel in the Alabama Army National Guard. (R.p. 4) Cole was one of several officers in the Military hierarchy who received federal extra duty pay which included extra pay for recruiting and retention activities, in addition to his state salary. (R. pp. 302, 306, 307)

Some of the evidence before the Committee reflected that in 1975 Colonel Cole

received $22,000.00 in state pay and $17,532.00 in federal pay for 166 extra duty days. Then Adjutant General Charles Rollo received $25,000.00 in state pay and $22,000.00 in federal pay for 171 days of active duty. Other officers who received large sums of federal pay for extra duty days included Colonel Speigner, Major Hathorn and Colonel Hora. (R. pp. 305-308) There was also testimony before the Committee that officers receiving federal pay claimed to have worked on weekends, Sundays, holidays, Christmas, the Fourth of July, Labor Day and Thanksgiving. (R. pp. 440, 571, 587) The hearings before the Committee were open to the public and widely reported in the press throughout the State. (R. pp. 148, 302, 444-448, 534-536, 604-612)

Both General Rollo and Cole were among the witnesses who testified before the Committee. When Cole testified before the Committee Representative Cates, another member of the Committee, did most of the

questioning and it was Cates who Cole said "browbeat" him during his testimony. (Cole depo. 542) During the course of the hearings it was reported that Holmes made the following statement: "Personally I don't believe you all worked all those days." (R. pp. 440, 444)

During the time the Committee was conducting its investigation Adjutant General Charles Rollo in March of 1976 requested that First Army also conduct an investigation into the recruiting and retention practices. Defendant Francis J. Cummings was one of the officers assigned to conduct the investigation. After Cummings' arrival in Montgomery the Committee extended an invitation to him to meet with the Committee. (R. p. 146)

The Committee had a short meeting at the State Capitol in the Committee room with Cummings and Major Holmes [1/] who was also

1/ Major Holmes' name is mentioned several times in the record and should not be confused with Defendant Alvin Holmes.

assigned by First Army to the federal investigation. The Committee advised the officers generally as to information the Committee had obtained, offered to cooperate with the federal investigation and asked that a thorough investigation be made. However, Cummings and Major Holmes never sought the Committee's assistance. (R. 146, 572)

Cole's name was not mentioned or discussed during the meeting with Cummings and the only matter Representative Holmes mentioned at the meeting was related to hiring practices in the Military Department. This was Holmes' only contact with Cummings and he never saw or talked to him again. Cole admitted he had no evidence that Holmes furnished Cummings any information and he believed Holmes' testimony that the only thing he mentioned at the Committee meeting concerned the hiring of minorities. (R.p. 147)

Cole acknowledged that Holmes' inquiry about hiring minorities would not constitute a conspiracy between Holmes and Cummings. Cole stated that his evidence of a conspiracy between Holmes and Cummings consisted of the meeting Cummings had with the Committee and the fact that he was subsequently suspended and dismissed. The suspension and dismissal action occurred more than a year after Cummings met with the Committee. (Cole's depo. pp. 544-545)

A Report of Inquiry (hereinafter referred to as ROI) was filed several months later by Cummings in September of 1976. It was a voluminous report of several hundred pages and exhibits and was reviewed and endorsed by the Inspector General of First United States Army and the Commanding General of First United States Army. The ROI among other things concluded that serious misconduct and improprieties had been committed in connection with the Recruiting and Retention program and recommended various corrective and disciplinary

action. (Exhibit 1 to Gray's Verified Answer R. pp. 27-31 and R. p. 147)

In addition, during the same time period, another group of federal investigators conducted an independent investigation and found that there was abuse in the Recruiting and Retention program. The Alabama Senate Budget Committee, of which Holmes was not a member, was also critical of the active duty pay received by high ranking Military Department employees and recommended a limitation on active duty days. (R. pp. 592, 593) And Governor Wallace ordered that it be stopped. (Cole depo. p. 500) The Office of the Examiner of Public Accounts was also critical of the National Guard administration in Alabama. (R. 604)

Newspapers throughout the State reported and were critical of high ranking officers receiving both state and federal pay and the practice was often referred to as "double dipping." (R. pp. 444-448, 534-536, 604-612)

After the ROI was received by Governor Wallace he requested the resignation of General Rollo and Henry Gray was appointed to succeed Rollo on or about March 24, 1977. General Gray decided to suspend Cole pending his own investigation. Gray then reviewed the ROI and conducted his own independent investigation which was the basis of hi decision to dismiss Cole. (R. pp. 147, 303, 304, Gray depo. 66-63, 298) Holmes and Gray never discussed Cole and Holmes never suggested or recommended that Cole be dismissed or suspended. (R. p. 147) <u>There has been no evidence that Holmes had any input on the decision to suspend or dismiss Cole</u>. Cole admitted that he had no evidence of any contacts or meetings between Gray and Holmes. (Cole depo. 559) Cole further testified that the only evidence he had that Holmes sought to suspend and dismiss him is that Jones called Holmes to invite him to go to lunch with Gray and Representative Cates, which luncheon Holmes did not

attend. (Cole depo. 548, 557-559) In addition, Cole testified that the basis and evidence of the alleged conspiracy between Gray and Holmes was that same luncheon meeting which Holmes did not attend. (Cole depo. 565-566)

Cole appealed his dismissal by General Gray to the State Personnel Board. After a lengthy hearing, the Board in July of 1977 ordered his reinstated but denied him thirty days of salary in addition to the thirty-day loss of salary imposed by General Gray at the time of his suspension. The Board, although ordering Colonel Cole reinstated with said thirty-day additional loss of pay, was also critical of the practice which permitted Colonel Cole and other high ranking officers to serve as much time on extra duty as Colonel Cole had. (R. pp. 63-65)

Shortly before the Personnel Board entered its order reinstating Cole, it appeared in the newspapers that Cole was going to be

reinstated. Holmes read about it in the newspapers and called Stanley Frazer, Director of the State Personnel Department, and asked who he should contact in order to appear before the Personnel Board and he also asked if Cole was going to be reinstated to his position as personnel officer. Holmes was informed that Dr. Ralph Adams was the person to contact about appearing before the Board and that Frazer had nothing to do with Cole getting his job back. However, Holmes never contacted Dr. Adams and did not appear before the Personnel Board. (Holmes' depo. pp. 45-49, R. p. 155-156)

Holmes was concerned about Cole resuming his duties as personnel officer because he did not think Cole was fair about the hiring of minorities. Holmes did not think enough blacks had been hired. He felt very strongly about this and talked also to Rollo about it. He thought public money should be used for blacks as well as anyone else, and that

blacks had the right to hold jobs. Holmes said the Military Department was the only State department where the only blacks working were in positions of maids and janitors. (Holmes' depo. pp. 45-49, Rp. 115-156)

With regard to the number of blacks in the National Guard and Military Department, Cole testified that there were between 1,500 and 2,000 recruiters in the National Guard and out of that number nine were black and Cole had advised Holmes of this number. In the Military Department there were five blacks working throughout the State, all of whom were custodial workers or laborers. Later one black clerical worker with a degree from AUM was hired to work in the mailroom and two other blacks were subsequently hired for the mailroom. (Cole depo. 572, 575-577)

After it was carried in the newspapers that Cole was going to be reinstated, it was reported in the press that Holmes was

opposed to the Personnel Board returning him to his job as personnel chief. Holmes was quoted as calling Cole the "most notarious racist out there." (R.p. 445)

While Cole's case was before the Personnel Board Gray wrote First Army and requested that Cole's federal recognition be withdrawn. Colonel James Stevenson prepared Gray's letter requesting the withdrawal of Cole's federal recognition and Gray relied on Colonel Stevenson and Colonel Roberts to prepare the charges. The matter of federal recognition was strictly an Army matter. (Gray's depo., pp. 136, 140, 163) Holmes did not even know Cole had federal recognition. It was Holmes' impression that Cole was a State employee and did not have federal recognition. (Holmes' depo. p. 32, R. p. 441)

Later that year in November of 1977, Speigner, Hathorn and Hora were reinstated to their military positions. During the

Committee hearings evidence had been presented that these three officers had received substantial federal pay for active duty days in addition to their regular salary. There was also evidence that Hawthorn operated a novelty company which sold recruiting and retention-type products to the National Guard. Furthermore, the ROI had been sharply critical of some of the activities of these officers. After it appeared in the papers that the officers were to be reinstated Holmes called Gray and asked him who ordered the reinstatement and Gray told him that the Governor had ordered it. (Gray's depo. 183-185; Holmes' depo. 53-54)

Regarding the reinstatements of Speigner, Hora and Hathorn, Holmes made the following statement on television:

> I am surprised that those individuals were not indicted by the Federal Grand Jury, and I'm surprised that they are not now serving in the

> federal penitentiary as they should be, and the Governor of this state gives an order to the State Adjutant General to reinstate these individuals. In my opinion Governor Wallace should be ashamed and he should hold his head in disgrace, and I don't like it, I resent it. I have made a request to the Secretary of the Army, Cliff Alexander, for an appointment.
>
> I'm gonna go to Washington to sit down with Mr. Alexander, the Secretary of the Army, in regards to the possibility of getting those individuals' federal recognition taken. It is obvious that Governor Wallace, the Commander In Chief of the Alabama National Guard, is not gonna do anything about the corruption in this-uh-state that exists with the Alabama National Guard.

(R. pp. 441, 447) The newspapers at this time also carried a similar report which stated:

> Holmes said he had asked for an appointment with Secretary of the Army Clifford Alexander to request that federal recognition to the reinstated officers be lifted.
>
> Holmes called the officers "some of the most corrupt individuals in my opinion, who have ever served in

> public office." He also said the governor "should be ashamed and should hold his head in disgrace" for ordering the reinstatements.
>
> Certain politicians who are friends of the officers "brought political pressure on the governor" for the reinstatement, Holmes said.
>
> "Wallace says he's for law and order but he's not for putting white collar criminals behind bars," said the black legislator. "If the officers had been black, they would have been indicted and convicted."
>
> In addition to traveling to Washington,D.C., to confer with Alexander, Holmes said he would consult the legislative committee chairman, Sen. Fred Jones of Montgomery, to see if anything could be done.
>
> "Each one of them lied when they came before the committee" said Holmes of the four National Guard officers.

(R. p. 446)

Holmes testified that he could not be and was not referring to Cole in these statements as Cole had been reinstated long before this time and had his job back. (Holmes' depo. 59, 79)

In December of 1977 Major Hathorn had a hearing on the withdrawal of his federal recognition. During the Hathorn hearing public statements had been made which were critical of the Committee's investigation. Because of the criticism Jones, Holmes and Representative Cates had a press conference at the State Capitol to explain the role of the Committee and it was reported in the press. (R. p. 441, 448)

The board who heard Hathorn's case failed to recommend withdrawal of his federal recognition and Holmes is quoted in the newspapers at that time as saying in regard to the Hathorn case:

> "the guy is guilty. Everybody who looks at the inspector general's report knows he's guilty. He should be punished." (R.p. 450)

With regard to Holmes' contacts with Jones they consisted of discussion of the military situation in Committee at the State Capitol and they both attended the press

conference in December of 1977. Jones apparently called Holmes and asked him to have lunch with Gray and others but Holmes does not even recall the invitation. In addition, although Holmes was aware of Jones' promotion to Brigadier General in the National Guard they never discussed it or Jones' relationship with Rollo. (R.p. 147, Holmes depo. pp. 12-14)

Cole admitted that the only evidence he had of a conspiracy between Jones and Holmes were the newspaper articles about the Committee meetings and "continuous outpouring of information from the Committee." (Cole depo. pp. 566-569)

Finally, it should be noted that Holmes fully supported a strong military and National Guard and felt that the National Guard should not only be strong in numbers but also in equipment. Holmes served voluntarily in the military for two years. (Holmes' depo. 44, 89)

Holmes also felt very strongly that anyone who did wrong, whether he be a General, Colonel or private, should be punished. And although his position of wrongdoing in the Military Department obviously differs with Cole's, Holmes testified that the Committee showed that individuals who came under investigations by the Committee had done things they should not have done and he felt they should have been given some kind of punishment. (Holmes' depo. 31, 34, 44, 70, 76-79) Holmes was simply trying to carry out his legislative duties while participating in the Committee investigations. (Holmes' depo. 44, 78)

ARGUMENT

1. Where the evidence conclusively shows that the facts relied upon to support allegations of conspiracy are not susceptable of an interpretation that might give rise to an inference of conspiracy there is no issue of fact for trial on the conspiracy complaint.

Petitioner's first contention concerns the court of appeals holding that there was insufficient evidence to raise a factual issue regarding the conspiracy aspect of the case. The court of appeals characterized these statements of conspiracy as "murky allegations * * * linked together by speculation and conclusory allegations." A review of the evidence, or rather the lack of evidence, presented to support the conspiracy claim fully supports the lower court's decision that there was no conspiracy.

In Adickes v. Kress and Company, 398 U.S. 144 (1970), this court held that in order to meet the burden of showing the absense of genuine issue of fact one must "show conclusively that a fact alleged by petitioner was 'not acceptable' of an interpretation that might give rise to an inference of conspiracy."

A review of the evidence clearly demonstrates

that Holmes has met this burden. The record shows that the allegations of conspiracy between Holmes and Cummings rest solely upon the fact that they both attended a meeting of the legislative committee. The evidence was that Holmes did not furnish Cummings any information at the committee meeting and that he never saw, talked, or contacted Cummings again. Even Cole acknowledged that the brief encounter Cummings and Holmes had at the committee meeting would not constitute a conspiracy. Cole also testified he believed Holms when he (Holmes) said that the only matter he mentioned during that committee meeting concerned the lack of hiring of minorities in the Military Department.

With regard to Jones, Cole admitted that the only evidence he had of a conspiracy between him and Holmes were the legislative committee meetings and newspaper articles about the Committee's investigation. There was no evidence of any contacts between them outside of committee meetings except for one invitation to lunch by Jones to Holmes,which was declined, and a joint press conference held by Jones, Holmes and Representative Cates months after Cole was reinstated to

explain the Committee's role in the investigation.

This leaves the allegations of a conspiracy between Holmes and Gray. Very little can be said as there was absolutely no evidence of a conspiracy between them. Their only contact was several months after Cole had been reinstated and it consisted simply of a telephone inquiry from Holmes to Gray about who ordered three other officers reinstated. Cole attempted to imply a conspiracy between Gray and Holmes based on evidence that Jones invited Holmes to have lunch with him and Gray. But there was no evidence that it was anything more than just that --- an invitation to have lunch, which Holmes does not even recall, and a luncheon he did not attend. Furthermore, the evidence was without conflict that Holmes had no imput whatsoever in Gray's decision to suspend or dismiss Cole.

Based on the evidentiary matter presented, respondent Holmes has certainly met the burden of foreclosing the possibility of a conspiracy. Considering the facts alleged and evidence presented, the record does not support any inference of a conspiracy but, instead, supports the decision of the court of appeals that there was insufficient evidence of a

conspiracy for trial.

The same could also be applied to the 1985 claim. In order to state a claim under 42 USC § 1985(3) there must be a showing of "some racial, or perhaps otherwise class based invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88 (1971).

The only thing the complaint here alleges with regard to any class is it refers to "the class of officers and enlisted persons of the Alabama National Guard whose political and public administration beliefs were similar to those of plaintiff", such beliefs being a strong National Guard. Petitioner's attempt to say that Holmes discriminated against those who believed in a strong National Guard is certainly not supported by the evidence. The record shows that Holmes not only believed and fully supported a strong National Guard and military, but he volunteered to serve and did serve honorably for two years in the military. Thus, there was no evidence of any class-based animus on the part of Holmes and no conspiracy in violation of § 1985(3).

Furthermore, to establish the intent to conspire,

knowledge of the conspiracy must be clear and not equivocal. Ingram v. United States, 360 U.S. 672 (1959). This court in Ingram also held that "charges of conspiracy are not to be made out by piling inference upon inference." Although Ingram was a criminal case, the same would be equally applicable to this case, and it clearly appears that such tactics were used here to allege a conspiracy.

Based on the foregoing authorities and evidence the decision of the court of appeals is correct as it conclusively appears that there is no inference of a conspiracy and, therefore, no factual issue for trial on the conspiracy complaint.

2. Where a state legislator is acting within the sphere of legitimate legislative activity his conduct is protected under the doctrine of legislative immunity.

The Fifth Circuit held that actions and statements by Holmes and Jones which occurred during the pendency of the legislative committee were protected by the doctrine of legislative immunity. Even petitioner concedes that statements made by them during the hearings were protected, but then petitioner

attempts to show that their "conduct" was not so protected.

It is most important to point out that petitioner fails to specify with any particularity the conduct or contacts by Holmes that were supposedly outside the realm of protected activity. Rather, petitioner simply by generalized, misleading,innuendo characterizes Holmes conduct as "cajoling" the executive branch. But the evidence does not support petitioner's position.

What the evidence does show is that there was no conduct or activity by Holmes that could by any stretch of the imagination be termed as cajoling or exhorting with a member of the executive branch. The evidence, as previously stated, shows that Holmes single contact with Cummings was at a committee meeting and the only thing Holmes mentioned was the hiring of minorities in the Military Department.

Analysing the activity of Holmes engaged in during the pendency of the committee there was no conduct that would fall under the prohibited conduct such as enunciated in Gravel v. United States, 408 U.S. 606 (1972). Rather, just as the Court of Appeals found,

Holmes conduct as described would come within the protection of Tenny v. Brandhove, 341 U.S. 367 (1951).

In Tenny, defendants were member of the California Legislature and also a legislative committee constituted by a resolution. The Committee asked local officials to institute criminal proceedings against plaintiff and the chairman of the committee read into the record a statement concerning an alleged criminal record of plaintiff. He then sued the members of the committee alleging that the committee hearing was not held for legislative purposes but was designed to prevent him from exercising his rights of free speech and to petition the Legislature and to deprive him of due process of the law. The District Court dismissed the action.

This court affirmed the judgment and held defendants were acting in a field where legislators traditionally have power to act and that they were not liable under the Civil Rights Act. This court stated in part:

> Investigations, whether by standing or special committees, are an established part of representative government. Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political passion,

> dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. (95 L. Ed. at pages 1027-1028)

It was further held that the claim of unworthy purpose does not destroy legislative immunity and that courts should not inquire into the motives of legislators. It was also noted that it is the duty of the Legislature to look diligently into every affair of government and to talk about what it sees. And the informing function of a representative body should be preferred even to its legislative function.

Applying the foregoing authorities to the case here the court of appeals correctly held that Holmes' conduct or statements made during the course of legislative committee activity were protected and he would be absolutely immune from suit for such conduct.

3. Alleged defamatory remarks do not constitute a deprivation of rights secured under the Fourteenth Amendment.

Cole also claims deprivation of a liberty interest as secured by the Fourteenth Amendment by alleging that he has been stigmatized and defamed by statements of Holmes. However, this type of claim has been held not to support a § 1983 action.

In Paul v. Davis, 424 U.S. 693 (1976), this court addressed the issue of stigmatization of one's reputation. It was held that the infliction of a stigma on one's reputation, without more, is not a deprivation of one's liberty or property interest within the meaning of the Fourteenth Amendment. In so holding, this court stated in part:

> But the Court has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment. (Emphasis supplied)
>
> * * * * * *
>
> While Roth recognize that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation

> perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment . . . . (424 U.S. at 706-709)

More recently, in the case of Baker v. McCollan, 443 U.S. 137 (1979), it was held that "The Fourteenth Amendment does not protect against all deprivation of liberty. It protects only against deprivations accomplished without due process of law." In Baker, this court, while addressing the issue of whether an official's conduct was unconstitutional, went on to say:

> For as the Court of Appeals recognized, a public official is liable under § 1983 only "if he causes the plaintiff to be subjected to deprivation of his constitutional rights." (emphasis in original)

In the case here, petitioner's allegations of deprivations of a liberty interest as related to any statements made by Holmes are totally conclusory and have no basis in fact. The statements most strongly urged by Cole to be defamatory must be considered in light of the time and circumstances when they were made. Basically, the statements attributed to Holmes took place in November and December of 1977. This was after Governor Wallace had ordered the reinstatements of Speigner, Hora and Hawthorne. Cole had been

reinstated by the Personnel Board several months prior. There was no reference to Cole in any of these statements. The statements in no way led to or contributed to any personnel or adverse action against Cole. In fact, Cole retained his employment.

The evidence shows that not only did Cole retain his employment but that he retained his federal recognition and that he was afforded full procedural due process. Nor was there a denial of substantive due process. The record shows that the Personnel Board did not absolve Cole of wrong doing and found that Gray could properly assess disciplinary action against Cole for his abuse of the rules and regulations.

Under the principals enunciated in Paul and Baker, inasmuch as Cole has not been deprived of protected liberty or property interest, has not been denied due process of the law, and Holmes has not caused Cole to be deprived of his constitutional rights, neither Holmes' actions or statements are actionable under § 1983.

4. Where the record is fully developed and there is no genuine issue of material fact and one is entitled to judgment as a matter of law, summary judgment should be entered in favor of the moving party.

Summary judgment in favor of respondent is particularly appropriate here as not only is there no genuine issue as to any material fact but respondent has established that no conspiracy existed, that there was no deprivation or a protected liberty or property interest, and that any action by Holmes during the pendency of the legislative committee was protected. Furthermore, there is no question but that Holmes was also protected under the doctrine of qualified immunity.

In Scheur v. Rhodes, 416 U.S. 232 (1974), it was held that public officials are entitled to a qualified immunity if they had "reasonable grounds for the belief formed at the time and in light of all the circumstances" and acted with a good faith belief, then they are immune from liability for damages arising out of their official conduct.

And in the instant case, the record is replete with evidence showing that Holmes acted in good faith just as the other defendants did. To briefly summarize,

the evidence shows that during the course of the legislative committee's investigation of irregularities in the National Guard it was learned that Cole, among other high ranking officers, had received substantial federal extra duty pay in addition to his State salary. There was also evidence of misuse of helicopters, canteen funds, State cars, improper expenditures of funds for dinners, conflict of interest in purchases, and that officers claimed to have worked on weekends, Sundays and all major holidays. (R. pp. 145, 146, 306, 604). In addition, other government entities investigated these matters and were critical of certain practices. Governor Wallace also ordered that the practice of receiving both federal and state pay for certain activities be stopped (R. pp. 592, 593, 604).

Holmes strongly believed that there was wrongdoing in the Military Department and it was his position that the Committee's investigation showed that the individuals had done things they should not have and that they should be given some type of punishment. Holmes also believed he was doing his legislative duty by participating in the Committee hearings.

It was also obvious that Holmes strongly

believed, with good reason, that Cole had not been fair about the hiring of minorities. Holmes was very concerned that the Military Department was the only State Department where blacks worked only in custodial positions (Holmes' deposition 45-49, R. pp. 115-156). Finally, during the time Holmes made his last statements there had been criticism of the Committee's investigation (R. pp. 441, 448).

Applying the standard set forth in Scheur v. Rhodes, supra, the only conclusion that can be drawn is that Holmes had reasonable grounds, at the time and under the circumstances, to believe that his actions and statements were necessary and justified and that he was performing his public duty.

In Butz v. Economou. 438 U.S. 478 (1978), this court recognized that suits based on the defense of immunity, such as the one here, can be disposed of on summary judgment. In Butz, it was stated:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, the Court recognized in Scheuer that damages suits concerning constitutional violations need not proceed to trial,

> but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. See 416 US, at 250, 40 L. Ed. 2d 90, 94 S.Ct. 1683, 71 Ohio Ops 2d 474. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procudure will ensure that federal officials are not harassed by frivolous lawsuits.

In the case here the record was fully developed with numerous depositions, affidavits, exhibits, documents, pleadings and briefs, all of which fully supported the granting of summary judgment in favor of Holmes. The only conclusion that can be reached based on the evidence presented here is that there was was no conspiracy, no deprivation of protected interests and that Holmes would be protected for his actions under the doctrines of legislative and qualified immunity. If civil rights suits such as the one here are permitted to be maintained because someone disagrees with a public official's strongly held convictions of public duty, then the protections and immunities given to public officials will no longer have any meaning and public officials will not only be apprehensive to discharge their duties but it could also result in terminating the independence of legislators that has always been so

highly revered and inhibit the legislative process. For the reasons stated it clearly appears that the decision of the Fifth Circuit Court of Appeals was correct.

CONCLUSION

We submit that Holmes is fully protected under the doctrines of legislative and qualified immunity for any conduct on his part. In addition, we submit the statements made by Holmes are not actionable under § 1983 and that the evidence failed to show that Cole was denied either a property or liberty interest. Finally, there was no evidence of any participation in a conspiracy by Holmes. The court of appeals was clearly correct in summary judgment and its decision and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William B. Moore, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 26th day of August, 1981, I did serve copies of this ~~petition and the accompanying appendix on Respondent~~ brief, by placing in the United States Mail, first-class postage prepaid, three copies properly addressed to the counsel of record for Respondent, as follows:

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I further certify that I have served all parties required to be served.

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